

AMENDED IN ASSEMBLY MAY 10, 2004

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 2889

Introduced by Assembly Member Laird
*(Coauthors: Assembly Members Calderon, Dymally, Goldberg,
Kehoe, Leno, Pavley, Reyes, and Ridley-Thomas)*
(Coauthor: Senator Kuehl)

February 20, 2004

An act to amend Section 12940 of the Government Code, relating to unlawful employment practices.

LEGISLATIVE COUNSEL'S DIGEST

AB 2889, as amended, Laird. Employment discrimination.

Existing law makes it an unlawful employment practice for an employer to harass or discriminate against an employee because of the employee's race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, or sexual orientation. Existing law further makes employers responsible for the acts of nonemployees with respect to sexual harassment in the workplace where the employer or its agents or supervisors knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

This bill would make employers responsible for the acts of nonemployees with respect to all forms of harassment in the workplace where the employer or its agents or supervisors knew or should have known of the conduct and failed to take immediate and appropriate corrective action.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 12940 of the Government Code is
2 amended to read:

3 12940. It shall be an unlawful employment practice, unless
4 based upon a bona fide occupational qualification, or, except
5 where based upon applicable security regulations established by
6 the United States or the State of California:

7 (a) For an employer, because of the race, religious creed, color,
8 national origin, ancestry, physical disability, mental disability,
9 medical condition, marital status, sex, age, or sexual orientation of
10 any person, to refuse to hire or employ the person or to refuse to
11 select the person for a training program leading to employment, or
12 to bar or to discharge the person from employment or from a
13 training program leading to employment, or to discriminate
14 against the person in compensation or in terms, conditions, or
15 privileges of employment.

16 (1) This part does not prohibit an employer from refusing to
17 hire or discharging an employee with a physical or mental
18 disability, or subject an employer to any legal liability resulting
19 from the refusal to employ or the discharge of an employee with
20 a physical or mental disability, where the employee, because of his
21 or her physical or mental disability, is unable to perform his or her
22 essential duties even with reasonable accommodations, or cannot
23 perform those duties in a manner that would not endanger his or
24 her health or safety or the health or safety of others even with
25 reasonable accommodations.

26 (2) This part does not prohibit an employer from refusing to
27 hire or discharging an employee who, because of the employee's
28 medical condition, is unable to perform his or her essential duties
29 even with reasonable accommodations, or cannot perform those
30 duties in a manner that would not endanger the employee's health
31 or safety or the health or safety of others even with reasonable
32 accommodations. Nothing in this part shall subject an employer to
33 any legal liability resulting from the refusal to employ or the
34 discharge of an employee who, because of the employee's medical
35 condition, is unable to perform his or her essential duties, or cannot

1 perform those duties in a manner that would not endanger the
2 employee's health or safety or the health or safety of others even
3 with reasonable accommodations.

4 (3) Nothing in this part relating to discrimination on account of
5 marital status shall do either of the following:

6 (A) Affect the right of an employer to reasonably regulate, for
7 reasons of supervision, safety, security, or morale, the working of
8 spouses in the same department, division, or facility, consistent
9 with the rules and regulations adopted by the commission.

10 (B) Prohibit bona fide health plans from providing additional
11 or greater benefits to employees with dependents than to those
12 employees without or with fewer dependents.

13 (4) Nothing in this part relating to discrimination on account of
14 sex shall affect the right of an employer to use veteran status as a
15 factor in employee selection or to give special consideration to
16 Vietnam era veterans.

17 (5) Nothing in this part prohibits an employer from refusing to
18 employ an individual because of his or her age if the law compels
19 or provides for that refusal. Promotions within the existing staff,
20 hiring or promotion on the basis of experience and training,
21 rehiring on the basis of seniority and prior service with the
22 employer, or hiring under an established recruiting program from
23 high schools, colleges, universities, or trade schools do not, in and
24 of themselves, constitute unlawful employment practices.

25 (b) For a labor organization, because of the race, religious
26 creed, color, national origin, ancestry, physical disability, mental
27 disability, medical condition, marital status, sex, age, or sexual
28 orientation of any person, to exclude, expel or restrict from its
29 membership the person, or to provide only second-class or
30 segregated membership or to discriminate against any person
31 because of the race, religious creed, color, national origin,
32 ancestry, physical disability, mental disability, medical condition,
33 marital status, sex, age, or sexual orientation of the person in the
34 election of officers of the labor organization or in the selection of
35 the labor organization's staff or to discriminate in any way against
36 any of its members or against any employer or against any person
37 employed by an employer.

38 (c) For any person to discriminate against any person in the
39 selection or training of that person in any apprenticeship training
40 program or any other training program leading to employment

1 because of the race, religious creed, color, national origin,
2 ancestry, physical disability, mental disability, medical condition,
3 marital status, sex, age, or sexual orientation of the person
4 discriminated against.

5 (d) For any employer or employment agency to print or
6 circulate or cause to be printed or circulated any publication, or to
7 make any non-job-related inquiry of an employee or applicant,
8 either verbal or through use of an application form, that expresses,
9 directly or indirectly, any limitation, specification, or
10 discrimination as to race, religious creed, color, national origin,
11 ancestry, physical disability, mental disability, medical condition,
12 marital status, sex, age, or sexual orientation, or any intent to make
13 any such limitation, specification or discrimination. Nothing in
14 this part prohibits an employer or employment agency from
15 inquiring into the age of an applicant, or from specifying age
16 limitations, where the law compels or provides for that action.

17 (e) (1) Except as provided in paragraph (2) or (3), for any
18 employer or employment agency to require any medical or
19 psychological examination of an applicant, to make any medical
20 or psychological inquiry of an applicant, to make any inquiry
21 whether an applicant has a mental disability or physical disability
22 or medical condition, or to make any inquiry regarding the nature
23 or severity of a physical disability, mental disability, or medical
24 condition.

25 (2) Notwithstanding paragraph (1), an employer or
26 employment agency may inquire into the ability of an applicant to
27 perform job-related functions and may respond to an applicant's
28 request for reasonable accommodation.

29 (3) Notwithstanding paragraph (1), an employer or
30 employment agency may require a medical or psychological
31 examination or make a medical or psychological inquiry of a job
32 applicant after an employment offer has been made but prior to the
33 commencement of employment duties, provided that the
34 examination or inquiry is job-related and consistent with business
35 necessity and that all entering employees in the same job
36 classification are subject to the same examination or inquiry.

37 (f) (1) Except as provided in paragraph (2), for any employer
38 or employment agency to require any medical or psychological
39 examination of an employee, to make any medical or
40 psychological inquiry of an employee, to make any inquiry

1 whether an employee has a mental disability, physical disability,
2 or medical condition, or to make any inquiry regarding the nature
3 or severity of a physical disability, mental disability, or medical
4 condition.

5 (2) Notwithstanding paragraph (1), an employer or
6 employment agency may require any examinations or inquiries
7 that it can show to be job-related and consistent with business
8 necessity. An employer or employment agency may conduct
9 voluntary medical examinations, including voluntary medical
10 histories, which are part of an employee health program available
11 to employees at that worksite.

12 (g) For any employer, labor organization, or employment
13 agency to harass, discharge, expel, or otherwise discriminate
14 against any person because the person has made a report pursuant
15 to Section 11161.8 of the Penal Code that prohibits retaliation
16 against hospital employees who report suspected patient abuse by
17 health facilities or community care facilities.

18 (h) For any employer, labor organization, employment agency,
19 or person to discharge, expel, or otherwise discriminate against
20 any person because the person has opposed any practices
21 forbidden under this part or because the person has filed a
22 complaint, testified, or assisted in any proceeding under this part.

23 (i) For any person to aid, abet, incite, compel, or coerce the
24 doing of any of the acts forbidden under this part, or to attempt to
25 do so.

26 (j) (1) For an employer, labor organization, employment
27 agency, apprenticeship training program or any training program
28 leading to employment, or any other person, because of race,
29 religious creed, color, national origin, ancestry, physical disability,
30 mental disability, medical condition, marital status, sex, age, or
31 sexual orientation, to harass an employee, an applicant, or a person
32 providing services pursuant to a contract. Harassment of an
33 employee, an applicant, or a person providing services pursuant to
34 a contract by an employee, other than an agent or supervisor, shall
35 be unlawful if the entity, or its agents or supervisors, knows or
36 should have known of this conduct and fails to take immediate and
37 appropriate corrective action. An employer may also be
38 responsible for the acts of nonemployees, with respect to
39 harassment of employees, applicants, or *other* persons providing
40 services pursuant to a contract in the workplace, where the

1 employer, or its agents or supervisors, knows or should have
2 known of the conduct and fails to take immediate and appropriate
3 corrective action. In reviewing cases involving the acts of
4 nonemployees, the extent of the employer's control and any other
5 legal responsibility which the employer may have with respect to
6 the conduct of those nonemployees shall be considered. An entity
7 shall take all reasonable steps to prevent harassment from
8 occurring. Loss of tangible job benefits shall not be necessary in
9 order to establish harassment.

10 (2) The provisions of this subdivision are declaratory of
11 existing law, except for the new duties imposed on employers with
12 regard to harassment.

13 (3) An employee of an entity subject to this subdivision is
14 personally liable for any harassment prohibited by this section that
15 is perpetrated by the employee, regardless of whether the
16 employer or covered entity knows or should have known of the
17 conduct and fails to take immediate and appropriate corrective
18 action.

19 (4) (A) For purposes of this subdivision only, "employer"
20 means any person regularly employing one or more persons or
21 regularly receiving the services of one or more persons providing
22 services pursuant to a contract, or any person acting as an agent of
23 an employer, directly or indirectly, the state, or any political or
24 civil subdivision of the state, and cities. The definition of
25 "employer" in subdivision (d) of Section 12926 applies to all
26 provisions of this section other than this subdivision.

27 (B) Notwithstanding subparagraph (A), for purposes of this
28 subdivision, "employer" does not include a religious association
29 or corporation not organized for private profit, except as provided
30 in Section 12926.2.

31 (C) For purposes of this subdivision, "harassment" because of
32 sex includes sexual harassment, gender harassment, and
33 harassment based on pregnancy, childbirth, or related medical
34 conditions.

35 (5) For purposes of this subdivision, "a person providing
36 services pursuant to a contract" means a person who meets all of
37 the following criteria:

38 (A) The person has the right to control the performance of the
39 contract for services and discretion as to the manner of
40 performance.

1 (B) The person is customarily engaged in an independently
2 established business.

3 (C) The person has control over the time and place the work is
4 performed, supplies the tools and instruments used in the work,
5 and performs work that requires a particular skill not ordinarily
6 used in the course of the employer's work.

7 (k) For an employer, labor organization, employment agency,
8 apprenticeship training program, or any training program leading
9 to employment, to fail to take all reasonable steps necessary to
10 prevent discrimination and harassment from occurring.

11 (l) For an employer or other entity covered by this part to refuse
12 to hire or employ a person or to refuse to select a person for a
13 training program leading to employment or to bar or to discharge
14 a person from employment or from a training program leading to
15 employment, or to discriminate against a person in compensation
16 or in terms, conditions, or privileges of employment because of a
17 conflict between the person's religious belief or observance and
18 any employment requirement, unless the employer or other entity
19 covered by this part demonstrates that it has explored any available
20 reasonable alternative means of accommodating the religious
21 belief or observance, including the possibilities of excusing the
22 person from those duties that conflict with his or her religious
23 belief or observance or permitting those duties to be performed at
24 another time or by another person, but is unable to reasonably
25 accommodate the religious belief or observance without undue
26 hardship on the conduct of the business of the employer or other
27 entity covered by this part. Religious belief or observance, as used
28 in this section, includes, but is not limited to, observance of a
29 Sabbath or other religious holy day or days, and reasonable time
30 necessary for travel prior and subsequent to a religious
31 observance.

32 (m) For an employer or other entity covered by this part to fail
33 to make reasonable accommodation for the known physical or
34 mental disability of an applicant or employee. Nothing in this
35 subdivision or in paragraph (1) or (2) of subdivision (a) shall be
36 construed to require an accommodation that is demonstrated by the
37 employer or other covered entity to produce undue hardship to its
38 operation.

39 (n) For an employer or other entity covered by this part to fail
40 to engage in a timely, good faith, interactive process with the

1 employee or applicant to determine effective reasonable
2 accommodations, if any, in response to a request for reasonable
3 accommodation by an employee or applicant with a known
4 physical or mental disability or known medical condition.

5 (o) For an employer or other entity covered by this part, to
6 subject, directly or indirectly, any employee, applicant, or other
7 person to a test for the presence of a genetic characteristic.

